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SUPER LAW GROUP, LLC

June 29, 2017

Via Certified Mail, Return Receipt Requested

Nicolia Ready Mix, Inc.
615 Cord Ave.
Lindenhurst, NY 11757

Nicolia Concrete Products, Inc.
640 Muncy Ave.
Lindenhurst, NY 11757

Nicolock Paving Stones, LLC
612 Muncy Ave.
Lindenhurst, NY 11757

Nicolia Ready Mix Inc.
3896 Long Beach Rd.
Island Park, NY 11558

Robert L. Nicolia
615 Cord Ave.
Lindenhurst, NY 11795

Re: Notice of Violation and Intent to File Suit under the Clean Water Act

Dear All:

We are writing on behalf of Sierra Club, particularly the Sierra Club's Atlantic Chapter and its Long Island Group,¹ to notify you of Sierra Club's intent to file suit against Nicolia Ready Mix, Inc., Nicolia Concrete Products, Inc., Nicolock Paving Stones LLC, and Robert Nicolia (together, "Nicolia") pursuant to Section 505(a) of the federal Clean Water Act ("CWA")² for violations of the CWA.

¹ Sierra Club is a not-for-profit environmental organization existing under the laws of the state of California, headquartered in San Francisco, California. Sierra Club has over 60 local chapters nationwide, including the Atlantic Chapter, composed of number Sierra Club Groups, such as the Long Island Group. Sierra Club's mission is to explore, enjoy, and protect the planet; to practice and promote responsible use of the earth's ecosystems and resources; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives. Sierra Club achieves its mission through public education, advocacy for sound public policies, and participation in legal and administrative forums. Sierra Club has more than 2.4 million members, including members of the Long Island Group who reside near, use and enjoy the Great South Bay and the waters and tributaries of the Great South Bay, including Santapogue Creek and Hempstead Bay; which is polluted by industrial stormwater runoff.

² 33 U.S.C. § 1365(a). We refer to statutory provisions by their section in the Clean Water Act and provide the parallel citation to the United States Code only on first reference.

Sierra Club intends to file suit, as an organization and on behalf of its adversely affected members, in the United States District Court for the Eastern District of New York seeking appropriate equitable relief, civil penalties, and other relief no earlier than 60 days from the postmark date of this letter.³

Sierra Club intends to take legal action because Nicolia is discharging polluted stormwater from its ready-mix concrete and concrete product manufacturing facility and stone cutting facility located near Santapogue Creek in Lindenhurst ("Lindenhurst Facilities") to the waters of the United States without a permit. Nicolia is also discharging polluted stormwater from its ready-mix concrete and concrete product manufacturing facility located in Island Park ("Island Park Facility") into Hempstead Bay. These discharges constitute violations of Sections 301(a) and 402(p)(2)(B) of the Clean Water Act.⁴ Further, Nicolia has not applied for coverage under, nor complied with the conditions of, an individual National Pollutant Discharge Elimination System ("NPDES") permit or the General Permit for the Discharge of Stormwater Associated with Industrial Activity ("General Permit")⁵ issued by the New York State Department of Environmental Conservation ("DEC"), in violation of Section 402(p), and 40 C.F.R. §§ 122.26(c)(1) and (e)(1).

The street addresses of the Lindenhurst Facilities are provided below:

1. 615 Cord Avenue, Lindenhurst, NY, 11757. This location can be uniquely identified by tax block and lot numbers as District 100, Section 215, Block 2, Lot 42.001 for the Town of Babylon, Suffolk County, NY.
2. 640 Muncy Avenue, Lindenhurst, NY, 11757. This location can be uniquely identified by tax block and lot numbers as District 100, Section 215, Block 1, Lot 18.00 for the Town of Babylon, Suffolk County, NY.
3. 200 Henry St, Lindenhurst, NY, 11757. This location can be uniquely identified by tax block and lot numbers as District 100, Section 215, Block 2, Lot 003.000 for the Town of Babylon, Suffolk County, NY.

The waters of the United States that are polluted by the Lindenhurst Facilities are Santapogue Creek and the Great South Bay.

The street address of the Island Park Facility is 3896 Long Beach Road, Island Park, NY, 11558. This location can be uniquely identified by tax block and lot numbers as Section 43, Block 404,

³ See 40 C.F.R. § 135.2(a)(3)(c) (notice of intent to file suit is deemed to have been served on the postmark date).

⁴ 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B).

⁵ New York State Department of Environmental Conservation, *SPDES Multi-Sector General Permit For Stormwater Discharges Associated With Industrial Activity*, Permit No. GP-0-12-001, (hereinafter "General Permit"), available at <http://www.dec.ny.gov/chemical/9009.html>. This General Permit replaces earlier general permits for the discharge of stormwater associated with industrial activity. It became effective on October 1, 2012, and will expire on September 30, 2017.

Lot 5, 6, and 9 for Nassau County. The waters of the United States that are polluted by the Island Park Facility are the surrounding tributaries and channels which flow to Hempstead Bay.

I.

BACKGROUND

With every rainfall event, hundreds of millions of gallons of polluted rainwater pour into New York's receiving waters. The consensus among agencies and water quality specialists is that stormwater pollution accounts for more than half of the total pollution entering the marine environment each year.⁶

DEC has designated more than 7,000 river miles, 319,000 acres of larger waterbodies, 940 square miles of bays and estuaries, and 592 miles of Great Lakes shoreline in the State as "impaired," or not meeting water quality standards, and unable to support beneficial uses such as fish habitat and water contact recreation.⁷ For the overwhelming majority of water bodies listed as impaired, stormwater runoff is cited as a primary source of the pollutants causing the impairment. Contaminated stormwater discharges can and must be controlled in order to improve the quality and health of these waterbodies.

The New York Water Quality Standards also set numeric and narrative criteria for different water pollution parameters including dissolved oxygen, oil and grease, suspended and settleable solids, bacteria (pathogens), pH, temperature, nutrients, and others. A waterbody must meet these numeric and narrative criteria in order to support its designated uses.⁸

Stormwater discharges flow from the Lindenhurst Facilities through a separate sewer system, and directly, into Santapogue Creek and ultimately into the Great South Bay. DEC has classified Santapogue Creek from its mouth to the Montauk Highway as an SC water and from the Montauk Highway to its source as a C water.⁹ Under New York's Water Quality Standards, waterbodies that are designated as SC and C are meant to be suitable for fishing and for fish, shellfish and wildlife propagation and survival.¹⁰

Stormwater discharges from the Island Park Facility flow through a separate sewer system into the surrounding tributaries and channels that flow into Hempstead Bay. DEC has classified the tributaries to Hempstead Bay as class SC waters.¹¹ Under New York's Water Quality Standards, waterbodies that are designated as SC are meant to be suitable for fishing and for fish, shellfish

⁶ Stormwater is water from precipitation events that flows across the ground and pavement after it rains or after snow and ice melt. See 40 C.F.R. § 122.26(b)(13).

⁷ See EPA, Watershed Assessment, Tracking and Environmental Results, New York Assessment Data for 2012, http://ofmpub.epa.gov/waters10/attains_state.report_control?p_state=NY&p_cycle=2012&p_report_type=A (last visited Aug. 4, 2015).

⁸ See 6 N.Y.C.R.R. §§ 702, 703.

⁹ See 6 N.Y.C.R.R. § 925.6.

¹⁰ See 6 N.Y.C.R.R. § 701.8 and 701.12.

¹¹ See 6 N.Y.C.R.R. § 925.6.

Nicolia's activities at the Island Park Facility include, but are not limited to, the purchase, collection, processing, and outdoor storage of sand, aggregate, and other substances used in manufacturing, loading, and delivering ready mix concrete and other concrete products. These activities include operation and storage of industrial equipment, and much of this activity is conducted outdoors. In carrying out these activities at the Island Park Facility, Nicolia stores and handles industrial materials in a manner that exposes pollutants to precipitation and snowmelt.

Sierra Club has observed the release of pollutants and polluted stormwater from the Island Park Facility offsite, to nearby storm drains and into the tributaries and canals that connect with Hempstead Bay. The stormwater discharged into Hempstead Bay from the Island Park Facility brings sand, concrete, cementitious material and other solids and sediments that suspend or dissolve in stormwater, metals such as zinc, copper, lead, cadmium, chromium, and arsenic; oil and hydraulic fluids, and other pollutants into the nearby channels that form part of Hempstead Bay.¹⁹

Trucks and other vehicles driving on and off the Island Park Facility are also point sources of pollution. The Island Park Facility uses heavy vehicles and stationary machinery outdoors. Vehicles and industrial equipment also may expose many other pollutants to the elements, including gasoline, diesel fuel, anti-freeze, and hydraulic fluids.

All of these pollution sources are exposed to precipitation and snowmelt. These pollution sources also may release fuel, oil, lubricants, PAHs, an array of metals, pH-affecting substances, and chemical residues. These toxic pollutants are often generated in the form of small particulate matter, which settles on the ground and other surfaces that are exposed to stormwater and non-stormwater flows.

Because Nicolia fails to adequately shelter and otherwise contain these materials to prevent their release to the environment, precipitation falls on and flows over exposed materials, fluids, and particulates. Polluted stormwater discharges flow from the Island Park Facility to storm drains and into the canals and tributaries that flow into Hempstead Bay.

Santapogue Creek and Hempstead Bay are "water[s] of the United States," as defined in 40 C.F.R. § 122.2 and, are therefore "navigable water[s]" as defined in Section 502(7) of the CWA. Nicolia does not have a NPDES permit for these discharges of pollutants. Thus, Nicolia is discharging polluted industrial stormwater into navigable waters of the United States without the permit required under Sections 301 and 402 of the CWA.

¹⁹ See EPA, "Industrial Stormwater Fact Sheet Series, Sector E: Glass, Clay, Cement, and Gypsum Product Manufacturing Facilities," available at http://www3.epa.gov/npdes/pubs/sector_e_glass.pdf.

B. Nicolia is Violating the Clean Water Act by Failing to Apply for NPDES Permit Coverage.

Nicolia is engaged in the business of providing ready mix concrete, concrete products, and stone cutting and manufacturing and, therefore, is an industrial discharger with a primary Standard Industrial Classification (“SIC”) Code in group 32. Accordingly, Nicolia is an industrial discharger engaged industrial activity included in Sector E of the General Permit.²⁰

To be eligible to discharge under the General Permit, Nicolia must submit to DEC a registration form called a “Notice of Intent.”²¹ Notice of Intent forms are available online from DEC.²² To register, Nicolia is required, among other things, to list all stormwater discharges, including descriptions of the industrial activities taking place in the drainage area of each discharge and the acreage of industrial activity exposed to stormwater, the separate storm sewer system or immediate surface water body or wetland to which site runoff discharges, and the name of the watershed and nearest waterbody to which the site ultimately discharges and information about whether the receiving waters are impaired.²³ Nicolia has failed to prepare and file a Notice of Intent or an application for an individual permit.²⁴

C. Nicolia is Violating the Clean Water Act by Failing to Comply with the General Permit.

As a discharger of stormwater associated with industrial activity, Nicolia must comply at all times with the requirements of the General Permit (or an individual permit).²⁵ By discharging stormwater associated with industrial activity without complying with the General Permit Nicolia is violating CWA Sections 301(a) and 402(a) and (p).²⁶ The main General Permit requirements that Nicolia has failed and continues to fail to meet are explained further below.

²⁰ To the extent the Nicolia engages in industrial activities that fall under other Sectors of the General Permit, Nicolia is subject to the requirements outlined in Part VIII of the General Permit.

²¹ See General Permit, Part I.E.3. In notifying Nicolia that the Clean Water Act requires coverage under and compliance with a valid NPDES permit in order to lawfully discharge, and that submission of a Notice of Intent to DEC is required in order to obtain coverage under the General Permit, Sierra Club does not concede that all of the activities conducted at the Facility are necessarily eligible for coverage under that permit. For example, if the Facility is discharging process wastewater, such as truck wash water, or has any other polluted non-stormwater discharge that is not authorized by the General Permit, then an individual NPDES permit is required and the failure to obtain and comply with an individual NPDES permit for such discharges also violates CWA §§ 301(a) and 402(p). The conditions for eligibility to discharge under the General Permit are provided in Part I.C of the permit.

²² See http://www.dec.ny.gov/docs/water_pdf/gpnoi.pdf.

²³ See Division of Water, NY DEC, *Notice of Intent For Stormwater Discharges Associated with Industrial Activity under the State Pollutant Discharge Elimination System (SPDES) Multi-Sector General Permit GP-0-12-001 (MSGP)* (2012), available at http://www.dec.ny.gov/docs/water_pdf/gpnoi.pdf.

²⁴ A thorough search of EPA’s Enforcement & Compliance History Online (“ECHO”) database and DEC’s records reveals that no Notice of Intent has been submitted for the Facility.

²⁵ This section discusses the compliance requirements of the General Permit. If Nicolia elects to seek coverage under an individual NPDES permit instead, the conditions of that individual permit will be at least as strict as those of the General Permit, thus Nicolia will still be required to comply with all of the following.

²⁶ Sections 301(a) and 402(a) and (p) make it unlawful for Nicolia to discharge stormwater associated with industrial activity without first complying with all of the conditions established in a NPDES permit.

- collect and analyze stormwater samples for each outfall at least annually;⁴³
- conduct visual monitoring of stormwater discharges at least quarterly;⁴⁴
- perform an annual dry weather inspection to detect non-stormwater discharges;⁴⁵
- inspect, sample and monitor discharges from coal pile runoff;⁴⁶
- inspect, sample and monitor discharges from secondary containment structures and transfer areas;⁴⁷
- document storm events during which any samples are taken;⁴⁸
- document all of these monitoring activities;⁴⁹
- keep records of the monitoring with the Facility's SWPPP;⁵⁰ and
- submit an annual report to DEC accompanied by a Discharge Monitoring Report detailing the results of all required stormwater samples, as well as reports that documents any instance of non-compliance with benchmarks or numeric effluent limitations.⁵¹

Because Nicolia engages in industrial activities associated under Sector E, sampling is required for:

- Total Suspended Solids;
- pH; and
- Total Recoverable Iron.⁵²

Sierra Club is not necessarily aware of all industrial activities taking place at the Facilities. To the extent that industrial activities other than the above are carried out at the Facilities, other sampling may be required as well.⁵³ This notice provides Nicolia with sufficient information to identify the standards and limitations that apply to all categories of industrial activity.

Nicolia has failed to conduct the required annual and other routine inspections, monitoring, and testing, as required by, at least, Parts III, IV, and VIII of the General Permit. Nicolia also has failed to retain records and submit monitoring reports to DEC, as required by, at least, Parts IV and VIII of the General Permit.

4. Nicolia has failed to comply with additional requirements located in Part VIII of the General Permit.

⁴³ See General Permit, Part IV.B.1.c (requiring at least annual collection and analysis of stormwater samples). See General Permit, Part IV.B.1.d, .e, .f, and .g for obligations to sample more frequently.

⁴⁴ See General Permit, Part IV.B.1.a.

⁴⁵ See General Permit, Part IV.B.1.b.

⁴⁶ See General Permit, Part IV.B.1.d.

⁴⁷ See General Permit, Part IV.B.1.f.

⁴⁸ See General Permit, Part IV.B.2.c.

⁴⁹ See, e.g., General Permit, Parts IV.B.1.a.8, IV.B.1.b.4, IV.B.1.c.9, see generally Part IV.E.

⁵⁰ See General Permit, Part IV.E.

⁵¹ See General Permit, Part IV.B.1 and 2 and Part IV.C.

⁵² See General Permit, Part VIII, Sector E.

⁵³ See General Permit, Part VIII.

As noted above, the General Permit contains various requirements specific to Sector E. These requirements, some of which are referenced above, are collected in Part VIII of the General Permit. They include:

- The site maps shall identify the locations of the following, if applicable:
 - Bag house or other dust control device;
 - Recycle/sedimentation pond, clarifier or other device used for the treatment of process wastewater and the areas that drain to the treatment device.
- A requirement to inspect while the facilities are in operation and include:
 - Material handling areas;
 - Above ground storage tanks;
 - Hoppers or silos;
 - Dust collection/containment system; and
 - Truck wash down/equipment cleaning areas.
- The facilities must prevent or minimize the discharge of:
 - Spilled cement;
 - Aggregate (including sand or gravel);
 - Kiln dust;
 - Fly ash;
 - Settled dust; and
 - Other significant materials in stormwater from paved portions of the site that are exposed to stormwater.
- The SWPPPs shall indicate the frequency of sweeping or equivalent measures. The frequency shall be determined based upon consideration of the amounts of industrial activity occurring in the area and frequency of precipitation, but shall not be less than once per week if cement, aggregate, kiln dust, fly ask, or settled dust are being handled or processed.
- Facilities shall prevent the exposure of fine granular solids to stormwater. Where practicable, these materials shall be stored in enclosed silos or hoppers, buildings, or under other covering.⁵⁴

Nicolia's activities are included in the definition of industrial activity to which the CWA applies. Therefore, Nicolía must obtain coverage under and comply with the requirements of the General Permit, including those specific to Nicolía's industrial activities, as described in Part VIII and

⁵⁴ See General Permit, Part VIII, Sector E.

outlined above. Nicolia has failed to obtain coverage under the General Permit and comply with these additional requirements.

5. Nicolia is Clearly Violating the Clean Water Act.

In sum, Nicolia's discharge of stormwater associated with industrial activities without a permit, Nicolia's failure to apply for permit coverage, and Nicolia's failure to comply with the above-listed conditions of the General Permit (or an individual NPDES permit) constitute violations of the General Permit and of Sections 301(a) and 402(p) of the Clean Water Act.

III.

PERSONS RESPONSIBLE FOR ALLEGED VIOLATIONS

Nicolia Ready Mix, Inc., Nicolia Concrete Products, Inc., Nicolock Paving Stones LLC, and Robert Nicolia (together, "Nicolia") are the persons, as defined by Section 502(5) of the CWA, responsible for the violations alleged in this Notice. Nicolia has operational control over the day-to-day industrial activities at the Lindenhurst Facilities and the Island Park Facility. Therefore, Nicolia is responsible for managing stormwater at the Facilities in compliance with the CWA. Sierra Club hereby puts Nicolia on notice that if Sierra Club subsequently identifies additional persons as also being responsible for the violations set forth above, Sierra Club intends to include those persons in this action.

IV.

LOCATION OF THE ALLEGED VIOLATION

The violations alleged in this Notice have occurred and continue to occur at the three Lindenhurst Facilities, located at 615 Cord Avenue, Lindenhurst, New York, 11757; 640 Muncy Avenue Lindenhurst, NY, 11757; and 200 Henry St Lindenhurst, NY, 11757; and the Island Park Facility, located 3896 Long Beach Road, Island Park, NY, 11558. Stormwater flows from the Lindenhurst Facilities into a separate sewer system that discharges directly into Santapogue Creek and from the Island Park Facility into a separate sewer system that discharges into the tributaries and channels surrounding Hempstead Bay. The failure to develop and implement pollution prevention plans and take the other required measures are violations occurring at the Facilities in general and in the inadequate documents themselves.⁵⁵

⁵⁵ The federal courts have held that a reasonably specific indication of the area where violations occurred, such as the name of the facility, is sufficient and that more precise locations need not be included in the notice. *See, e.g., Natural Resources Defense Council v. Southwest Marine, Inc.*, 945 F. Supp. 1330, 1333 (S.D. Cal. 1996), *aff'd* 236 F.3d 985, 996 (9th Cir. 2000); *City of New York v. Anglebrook Ltd. Partnership*, 891 F. Supp. 900, 908 (S.D.N.Y. 1995); *Assateague Coastkeeper v. Alan & Kristin Hudson Farm*, 727 F. Supp. 2d 433, 439 (D. Md. 2010); *United Anglers v. Kaiser Sand & Gravel Co.*, No. C 95-2066 CW, 1995 U.S. Dist. LEXIS 22449 at *4 (N.D. Cal. Sept. 27, 1995).

V.

DATES OF VIOLATION

Every day upon which Nicolia has failed to apply for permit coverage since Nicolia first commenced operations at the Facilities and discharged polluted stormwater is a separate violation of Section 301(a) of the CWA and EPA's regulations implementing the CWA.⁵⁶ These days of violation have continued consecutively since Nicolia commenced operation at the Facilities.

Additionally, Nicolia has discharged without a permit in violation of Section 301(a) of the CWA on every day since Nicolia commenced operations at the Facilities on which there has been a measurable precipitation event or discharge of previously accumulated precipitation (i.e., snowmelt) over 0.1 inches. Examples of dates when such discharges have occurred include but are certainly not limited to May 3 and 4, 2016, May 8, 2016, and Nov. 15, 2016.

Finally, if Nicolia seeks permit coverage after receiving this letter but fails to fully comply with the requirements of the General Permit (or an individual permit), each day upon which Nicolia fails to comply with that permit will constitute a separate day of violation with respect to each unmet condition of that permit.

Nicolia is liable for the above-described violations occurring prior to the date of this letter and for every day after the date of this letter that these violations continue. In addition to the violations set forth above, this Notice covers all violations of the CWA evidenced by information that becomes available after the date of this Notice of Intent to File Suit.⁵⁷ These violations are ongoing, and barring full compliance with the permitting requirements of the Clean Water Act, these violations will continue.

VI.

RELIEF REQUESTED

Sierra Club will ask the court to order Nicolia to comply with the Clean Water Act, to pay penalties, and to pay Sierra Club's costs and legal fees.

⁵⁶ See 33 U.S.C. §§ 402(p)(3)(A) and (p)(4)(A) (requiring the establishment of industrial stormwater NPDES permits and of a permit application process).

⁵⁷ See, e.g. *Public Interest Research Grp. v. Hercules, Inc.*, 50 F.3d 1239, 1248-49 (3d Cir.1995) (a notice that adequately identifies specific violations to a potential defendant also covers repeated and related violations that the plaintiff learns of later. "For example, if a permit holder has discharged pollutant 'x' in excess of the permitted effluent limit five times in a month but the citizen has learned only of four violations, the citizen will give notice of the four violations of which the citizen then has knowledge but should be able to include the fifth violation in the suit when it is discovered.").

First, Sierra Club will seek declaratory relief and injunctive relief to prevent further violations of the Clean Water Act pursuant to Section 505(a) and (d), and such other relief as permitted by law. Sierra Club will seek an order from the Court requiring Nicolia to obtain NPDES permit coverage and to correct all other identified violations through direct implementation of control measures and demonstration of full regulatory compliance.

Second, pursuant to Section 309(d) of the CWA,⁵⁸ each separate violation of the CWA subjects Seville to a penalty not to exceed \$37,500 per day for each violation that occurred prior to November 2, 2015, and up to \$52,414 per day for each violation that occurred after November 2, 2015.⁵⁹ Sierra Club will seek the full penalties allowed by law.

Third and lastly, pursuant to Section 505(d) of the CWA, Sierra Club will seek recovery of litigation fees and costs (including reasonable attorney and expert witness fees) associated with this matter.

VII.

PERSONS GIVING NOTICE

The full name, address, and telephone number of the persons giving notice are as follows:

Sierra Club (Long Island Group)
85 Second Street, 2nd Floor
San Francisco, CA 94105
attn: Katie Schaefer

VIII.

IDENTIFICATION OF COUNSEL

Sierra Club is represented by legal counsel in this matter. The name, address, and telephone number of Sierra Club's attorneys are:

Michael DiGiulio
Nicholas W. Tapert
Super Law Group, LLC
180 Maiden Lane, Suite 603
New York, New York, 10038
(212) 242-2355

⁵⁸ 33 U.S.C. § 1319(d); *see also* 40 C.F.R. § 19.4 (Adjustment of Civil Monetary Penalties for Inflation).

⁵⁹ 40 C.F.R. §§ 19.2 and .4.

IX.

CONCLUSION

The foregoing provides more than sufficient information to permit Nicolia to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice.⁶⁰

If Nicolia has developed SWPPPs for any of the Lindenhurst Facilities or the Island Park Facility, Sierra Club requests that Nicolia send a copy to the undersigned attorney.⁶¹ Otherwise, Sierra Club encourages Nicolia to begin developing SWPPPs immediately after receiving this letter and asks that Nicolia please inform the undersigned attorney of Nicolia's efforts so Sierra Club can work with Nicolia to avoid disputes over the contents of the SWPPP.⁶²

During the sixty-day notice period, Sierra Club is willing to discuss effective remedies for the violations noted in this letter that may avoid protracted litigation. If Nicolia wishes to pursue such discussions, please contact the undersigned attorney immediately so that negotiations may be completed before the end of the sixty-day notice period. We do not intend to delay the filing of a complaint in federal court, regardless of whether discussions are continuing at the conclusion of the sixty days.

⁶⁰ 40 C.F.R. § 135.3(a).

⁶¹ Note that under Part III.D.2 of the General Permit, the owner or operator of a facility "must make a copy of the SWPPP available to the public within 14 days of receipt of a written request."

⁶² Sierra Club will not send a new notice letter in response to any effort Nicolia makes to come into compliance with the Clean Water Act after receiving this letter, for example, by developing a SWPPP. The federal courts have held that citizens sending a notice letter are not required to identify inadequacies in compliance documents that do not yet exist and are "not required to send a second notice letter in order to pursue specific claims regarding the inadequacies of [a defendant's] post-notice compliance efforts." *WaterKeepers N. Cal. v. AG Indus. Mfg.*, 375 F.3d 913, 920 (9th Cir. 2004). See also *Natural Resources Defense Council v. Southwest Marine, Inc.*, 236 F.3d 985, 997 (9th Cir. 2000) ("subject matter jurisdiction is established by providing a notice that is adequate on the date it is given to the defendant. The defendant's later changes . . . do not retroactively divest a district court of jurisdiction under 33 U.S.C. § 1365(b)."); *City of New York v. Anglebrook L.P.*, 891 F. Supp. 900, 908 (S.D.N.Y. 1995) (plaintiff's notice letter based on inadequacies of defendant's original SWPPP held sufficient to establish court's jurisdiction, even though defendant later prepared a revised SWPPP).

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Sincerely,



Michael DiGiulio
Super Law Group, LLC
180 Maiden Lane, Suite 603
New York, New York 10038
(212) 242-2355

cc:

Scott Pruitt, Administrator
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Catherin R. McCabe, Acting EPA Region 2 Administrator
Environmental Protection Agency
290 Broadway
New York, NY 10007-1866

Basil Seggos, Commissioner
New York State Department of Environmental Conservation
625 Broadway
Albany, NY 12233-1011